STATE OF MICHIGAN

COURT OF APPEALS

In re HARRIET FISHBECK TRUST

WILLIAM M FISHBECK,

Petitioner-Appellant,

v

CATHERINE A. BRAUN,

Respondent-Appellee.

UNPUBLISHED
April 24, 2003

No. 233858
LC No. 91-096477-TI
LC No. 90-094073-SE

Before: Donofrio, P.J., and Markey and Murray, JJ.

PER CURIAM.

Petitioner appeals by right the decision of the probate court finding facts and imposing no surcharge on respondent on remand from our Supreme Court, *In Re Fishbeck Trust (Fishbeck v Braun),* 463 Mich 940; 620 NW2d 851 (2000), which vacated Part III of *In re Harriet Fishbeck Trust*, unpublished opinion per curiam of the Court of Appeals, issued October 5, 1999 (Docket No. 208585), (*Fishbeck II*). We affirm.

The underlying facts of this case need not be repeated here. In a 1993 bench trial the probate court found that in 1956 the petitioner and his parents orally agreed to convey the family farm and its related equipment to him on their death. The probate court also found that the family agreement was amended in 1980 to give petitioner only a life estate in part of the farm, which would pass on his death to respondent's children from her first marriage. This Court affirmed the trial court's judgment granting specific performance of the amended family agreement instead of Harriet's 1987 amended trust and last will and testament, *In Re Harriet Fishbeck Trust*, unpublished opinion per curiam of the Court of Appeals, issued April 5, 1996 (Docket No. 170708), (*Fishbeck I*), lv den sub nom *In Re Fishbeck Trust (Fishbeck v Braun),* 454 Mich 915; 564 NW2d 49 (1997).

With this latest appeal, petitioner first argues that the doctrine of the law of the case does not preclude his challenge to respondent's children taking under the amended family agreement

as determined by the trial court in its 1993 judgment. We disagree. Whether the law of the case applies is a question of law subject we review de novo, *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001), but the trial court's factual findings are reviewed for clear error, MCR 2.613(C); *In re Webb H Coe Marital and Residuary Trusts*, 233 Mich App 525, 531; 593 NW2d 190 (1999).

The doctrine of the law of the case provides that "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000), quoting *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). The doctrine also binds lower courts, which may take no action on remand that is inconsistent with an appellate court's decision on the case. *In re TM (After Remand)*, 245 Mich App 181, 191; 628 NW2d 570 (2001); *McCormick v McCormick (On Remand)*, 221 Mich App 672, 677-679; 562 NW2d 504 (1997). Here, the trial court was limited by the purposes for which our Supreme Court remanded this case, to "consideration [of] whether respondent should be surcharged" under former MCL 700.544(1) and MCL 700.818(2) and (4), and to "make the necessary findings of fact and determine whether to impose a surcharge." *In Re Fishbeck Trust, supra*, 463 Mich 940.

The application of the law of the case is a discretionary policy of the courts, *Grace v Grace*, 253 Mich App 357, 363; 655 NW2d 595 (2002), but is followed to foster finality of judgment and also because an appellate court lacks jurisdiction to modify its own judgments except on rehearing, *Grievance Administrator, supra*, 260; *Ashker, supra*, 13; "The law of the case is applied to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts." 5 Am Jur 2d, Appellate Review § 605, p 301.

The law of the case may not be applied where the facts have materially and substantially changed, *Grace*, *supra*, 362, or where an intervening change in the law has occurred, *Sumner v General Motors Corp (On Remand)*, 245 Mich App 653, 662; 633 NW2d 1 (2001), but petitioner alleges neither a change in the facts nor a change in the law. Although the doctrine of the law of the case is inapplicable to issues that have not actually been decided either implicitly or explicitly in the prior appeal, *Grievance Administrator, supra*, 261, here, the trial court specifically found in its original judgment that any alleged influence by respondent in 1987 (when Harriet changed her will and trust) had no bearing on the family agreement reached in 1956 and modified in 1980. This Court affirmed the family agreement, as determined by the trial court in *Fishbeck I, supra*, and specifically affirmed the trial court's declination to reach the petitioner's claim of undue influence. *Fishbeck I, supra*, slip op at 8

Thus, Petitioner's undue influence claim is beyond the scope of remand, was already addressed by the trial court it its initial judgment, and affirmed by this Court in *Fishbeck I, supra*. Further litigation of this issue is barred by the law of the case and the need for finality of judgment. *Grievance Administrator, supra*, 261; 5 Am Jur 2d, Appellate Review § 605, p 301. Similarly, petitioner's claim of breach of fiduciary duty (which could not have arisen until after

the amended family agreement was in place in 1980) was implicitly rejected because it was immaterial to the amended family agreement.

Next, petitioner argues that on remand the trial court erred by finding that respondent did not breach any fiduciary duties, including failing to keep petitioner informed of the administration of Murray's trust and failing to exercise undivided loyalty. Accordingly the trial court abused its discretion by not surcharging respondent. We disagree. Equitable principles govern proceedings in probate court, *In re Cox's Estate*, 284 Mich 628, 633; 279 NW 913 (1938), and appeals are not de novo but on the record, MCR 5.802(B)(1); MCL 600.866(1); *In re Green Charitable Trust*, 172 Mich App 298, 331; 431 NW2d 492 (1988). Although, factual findings of the probate court are reviewed for clear error, *In re Webb H Coe Marital and Residuary Trusts*, *supra*, 531, substantive decisions of the probate court, including whether to surcharge a fiduciary, are reviewed for an abuse of discretion, *In Re Tolfree's Estate*, 347 Mich 272, 289, 291; 79 NW2d 629 (1956); *In re Rice Estate*, 138 Mich App 261, 270; 360 NW2d 587 (1984). An abuse of discretion occurs only when a trial court's decision is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment, but defiance thereof, not the exercise of reason but rather of passion or bias." *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000), quoting *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227-228; 600 NW2d 638 (1999), and quoting *Spalding v Spaldin*g, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

Analysis of this issue must start with the purpose for which our Supreme Court remanded this case to the trial court, which was to "make the necessary findings of fact and determine whether to impose a surcharge" under former MCL 700.544(1) and MCL 700.818(2) and (4). *In Re Fishbeck Trust*, *supra*, 463 Mich 940. Our Supreme Court properly reminded this Court that it is the trial court that determines facts in the first instance, and this Court reviews those findings for clear error. MCR 2.613(C). When testimony before the trial court conflicts, this Court will accord great deference to the trial court's assessment of credibility because of its ability to hear and see the witnesses as they testify. *Sparling Plastic Industries, Inc v Sparling*, 229 Mich App 704, 716; 583 NW2d 232 (1998); *In re Leone Estate*, 168 Mich App 321, 324; 423 NW2d 652 (1988).

Here, it was undisputed, and the trial court properly found, that at the time of the alleged improprieties, respondent was not the trustee of Harriet's trust. Although respondent was the nominal co-trustee of Murray's trust, she never exercised any control over or administered any of the property in either trust. Thus, as to Harriet's trust, respondent could not be found liable because she was not a trustee, and as to Murray's trust, respondent could not be liable for any obligations "*arising from ownership or control of property of the trust estate*," or for torts committed "*in the course of administration of the trust estate*" because she did not exercise ownership or control, or administer the trust estate. The trial court did not clearly err by finding no liability under former MCL 700.818(2).

For the same reasons, the trial court did not clearly err by finding that respondent breached no duty under former MCL 700.544(1) that caused loss to the estate. No loss occurred to Murray's trust as result of improprieties listed in the statute: embezzlement; commingling (it was petitioner who controlled the trust assets and commingled them); negligence or wanton

mishandling of an estate (petitioner managed and controlled the trust assets); self-dealing (the trial court found that the changes Harriet made were her own uninfluenced by respondent); failure to account or to timely terminate an estate (none was alleged); and, the trial court found no other breach of duty occurred.

Harriet was the settlor of her own trust. By its terms, she could revoke or amend in her discretion. Further, under Murray's trust, Harriet held a power of appointment over Murray's trust A (the marital deduction trust), which she exercised on her death through article III of her last will and testament. Petitioner argues that Harriet was required to give him notice as co-trustee pursuant to art. V, § (B)(7) (an intervivos power of appointment) of Murray's trust agreement but Harriet exercised her testamentary power of appointment authorized by art. V, § (B)(3). Harriet was neither required to give notice to the trustee of Murray's trust by the trust agreement nor was it advisable because her will was always revocable and subject to amendment before her death. Thus, notice to petitioner as co-trustee of Murray's trust after Harriet's death (when her last will and testament was filed with the probate court) was proper. Furthermore, as a contingent beneficiary during Harriet's lifetime of Harriet's intervivos, revocable trust, Harriet did not have a fiduciary duty to advise petitioner of amendments to her trust agreement. "The trustee shall keep the presently vested beneficiaries of the trust reasonably informed of the trust and its administration." MCL 700.814(1), repealed by 1998 PA 386, effective April 1, 2000. See e.g., *In re Childress Trust*, 194 Mich App 319; 486 NW2d 141 (1992) (a contingent beneficiary of a revocable, intervivos trust became a vested contingent beneficiary after the trust became irrevocable on the death of the settlor).

As for respondent's duties as co-trustee of Murray's trust, the trial court obviously chose to credit respondent's testimony that she did not understand the legal documents involved, that she never counseled or suggested that her mother exercise her power of appointment or amend her trust agreement, that she did not know what Harriet intended to do when she drove her mother (who was not a licensed driver) to Urquhart's office, and after the fact, Harriet did not inform respondent of any detail (consistent with the trial court's finding that Murray and Harriet kept financial matters "close to the vest"), but only that she had changed things "to make things fair." The record amply supports the trial court's factual determination that Harriet acted of her own free will and was not uninfluenced by respondent.

Further, the trial court correctly noted that to establish a breach of fiduciary duty it is necessary show more than "mere mistakes or errors of judgment where [a fiduciary has] acted in good faith," *In re Green Charitable Trust*, *supra*, 314, and that a showing of "bad faith," or "arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty," *id*., 315, quoting *Commercial Union Ins Co v Liberty Mutual Ins Co*, 426 Mich 127, 136, 393 NW2d 161 (1986), is required. On this record, the trial court did not clearly err by finding that respondent did not act in bad faith.

Former MCL 700.818(4) provided: "The question of liability as between the estate and the trustee individually may be determined in a proceeding for accounting, surcharge, indemnification, or other appropriate proceeding." A proceeding to "surcharge" a trustee occurs when a fiduciary is held personally liable for a loss caused to the estate by breach of fiduciary duty. For example, when a breach of fiduciary duty resulted in loss to an estate (failing to timely

close the estate as required by statute before a bank failure), each of three co-executors was surcharged for the loss. *In Re Tolfree's Estate*, *supra*, 288. In the present case, the trial court did not clearly err by finding that even if respondent breached a fiduciary duty, no loss to the estate occurred as a result because Harriet's amended trust and will were not enforced. Thus, the trial court did not abuse its discretion by determining that no surcharge should be imposed on respondent.

However, the real issue in this case is whether petitioner may "surcharge" respondent for his attorney fees as result of a decade of litigation. As this Court noted in *Fishbeck II*, slip op 3, Michigan follows the American rule whereby each litigant is responsible for his own attorney's fees in the absence of an express statute, court rule, or judicial exception. *In re Freeman Estate*, 218 Mich App 151, 156-157; 553 NW2d 664 (1996); *In re Sloan Estate*, 212 Mich App 357, 361; 538 NW2d 47 (1995). Michigan also follows the rule that to obtain compensation from an estate for legal services rendered, the estate must have been conferred a benefit by either an increase or preservation of its assets. *Id*., 362; *In re Valentino Estate*, 128 Mich App 87, 94-95; 339 NW2d 698 (1983). Here, petitioner may not recover his legal fees because they were not incurred to enhance or preserve the estate. They were incurred to enforce the family agreement in derogation of his mother's amended trust and last will and testament.

Petitioner also cannot prevail under the theory that he successfully defended an action to remove him as co-trustee. Several Michigan cases have allowed a fiduciary to recover attorney fees from the estate as an expense of administration after successfully defending a removal action on theory that stability of administration benefits the estate. See e.g., *In re Gerber Trust*, 117 Mich App 1, 323 NW2d 567 (1982), and *In re Hammond Estate*, 215 Mich App 379, 387-388; 547 NW2d 36 (1996). *In re Valentino Estate*, *supra*, is also instructive. This Court held that attorney fees incurred by the guardian and the conservator (separate persons) of a protected minor child of the decedent could not be assessed against the decedent's estate because there was no benefit to the estate from the litigation initiated by either the guardian or conservator. *Id.* at 93-94. Further, this Court noted that a fiduciary must have fully prevailed and not contributed to the underlying cause of the litigation to recover attorney fees from the estate, opining:

> Because the orderly administration of an estate requires that fiduciaries not be changed unnecessarily, we hold that attorney's fees for defending the fiduciary may be chargeable to the estate. However, the *Baldwin* [*In re Baldwin's Estate*, 311 Mich 288; 18 NW2d 827 (1945) (fiduciary did not fully prevail)] and *Davis* [*In Re Davis's Estate*, 312 Mich 258; 20 NW2d 181 (1945) (fiduciary contributed to the situation resulting in litigation)], cases show that, where the fiduciary does not completely prevail, or where the fiduciary was partially to blame for bringing about unnecessary litigation, the fiduciary rather than the estate should be responsible for the [fiduciary's] attorney's fees. [*Id*., 95-96:]

In this case, although respondent in 1991 moved to remove petitioner as a co-trustee or in the alternative to appoint a receiver, petitioner's primary litigation was instituted to compel distribution of the estate and trust property in derogation of the express terms of Harriet Fishbeck's last will and amended trust. For the most part, petitioner was successful, except that the trial court found that the family agreement was amended in 1980. As to respondent's motion

to remove petitioner, the trial court denied it in an order entered on June 3, 1992, that also permitted petitioner to amend his complaint to allege that respondent breached her fiduciary duties and also addressed discovery issues. In deciding the removal motion, the trial court ruled:

> The request for appointment of a receiver is denied. The court is not persuaded that a receiver will enhance the ability of the parties who ultimately prevail to collect any judgment that may be rendered in this case. The court directs that William Fishbeck maintain accounting records in a manner and form agreed to by all parties, and failing that, in manner and form ordered by the court following hearing requested by any interested party. [Order with respect to discovery, jury trial, and William Fishbeck's request to amend pleadings, June 3, 1992; ¶ 2.]

Thus, respondent's motion for removal was a minor pretrial matter resolved well before the trial in this matter was commenced a decade ago. The litigation here did not involve attempting to remove petitioner as co-trustee; it centered on petitioner's claim that an oral family agreement existed contrary to the will and trust of his mother. Moreover, petitioner was not without fault for the main litigation (keeping the family agreement a secret, even from the family's estate planning attorney), and for the removal motion (exclusion of respondent from management of the trusts and commingling of trust assets). Petitioner also did not totally prevail on either matter. The trial court found that the family agreement was slightly different from what petitioner claimed, and on the removal motion, petitioner was ordered to account "in a manner and form agreed to by all parties," or as ordered by the court. Of course, the main reason petitioner cannot prevail on his claim for surcharge is that his attorney fees were not incurred to benefit the estate, the incurred attorney fees benefit William Fishbeck. *In re Sloan Estate*, 361-362. Petitioner simply provides no authority or meritorious argument that an exception to the American rule applies in this case. *Radenbaugh v Farm Bureau Gen Ins Co of Michigan*, 240 Mich App 134, 152; 610 NW2d 272 (2000).

Petitioner also argues the doctrine of clean hands renders the family agreement unenforceable by respondent's children because it is the product of respondent's disloyalty. We disagree.

The doctrine of clean hands may be asserted as a defense to a claim for equitable relief and provides, "that one who seeks the aid of equity must come in with clean hands." *Rose v National Auction Group*, 466 Mich 453, 463; 646 NW2d 455 (2002), quoting *Stachnik v Winkel*, 394 Mich 375, 382; 230 NW2d 529 (1975), quoting *Charles E Austin, Inc v Secretary of State*, 321 Mich 426, 435; 32 NW2d 694 (1948). Moreover, to bar relief under the clean hands doctrine the misconduct of the party seeking relief "must bear a more or less direct relation to the transaction concerning which complaint is made . . . ." *McFerren v B & B Investment Group*, 253 Mich App 517, 254; 655 NW2d 779 (2002), quoting *McKeighan v Citizens Commercial & Savings Bank of Flint*, 302 Mich 666, 671; 5 NW2d 524 (1942).

Here, respondent did not seek enforcement of the family agreement in equity, petitioner did. Respondent, in fact, offered proofs in opposition to the existence of the family agreement, which the trial court considered together with all of the other evidence in arriving at its conclusion, affirmed on appeal, that the family agreement was amended in 1980, well before any alleged impropriety by respondent. Further, respondent's alleged misconduct in 1987 bore no

direct or indirect relation to the family agreement, last amended in 1980. Thus, the doctrine of clean hands as a defense to equitable relief has no application to the instant case. Moreover, petitioner's argument also fails under principles fostered by the law of the case doctrine: finality of judgment and lack of jurisdiction by this Court to modify its prior judgment except on rehearing. *Grievance Administrator, supra,* 261; *Ashker, supra,* 13.

Finally, petitioner argues that the trial court erred by failing to impose mandatory sanctions pursuant to MCR 2.116(F) and 2.114. We disagree. Petitioner fails to cite where in the record the trial court was specifically requested to impose sanctions for alleged violations of MCR 2.114(D), or requested that the trial court find respondent or her counsel in contempt pursuant to MCR 2.116(F). Both court rules require a finding by the trial court of a violation of the court rules. As a general rule, this Court will only review issues decided by the trial court. *Candelaria v B C General Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999). *Bowers v Bowers,* 216 Mich App 491, 495; 549 NW2d 592 (1996). See also *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999) (to be preserved for appeal an issue must be both raised and decided by the trial court).

Petitioner asserts this issue was raised as part of his motion to surcharge respondent, which requested only that the trial court "assess cost and attorney fees against respondent." Petitioner filed his motion on June 19, 1997, years after the alleged court rule violations. On remand, the trial court rejected petitioner's factual claims and denied petitioner's motion to surcharge respondent. As discussed above, the trial court did not clearly err in its factual findings or abuse its discretion by denying a surcharge. In sum, petitioner abandoned this issue by failing to timely preserve it, and it was properly rejected as part of the trial court's order on remand denying imposition of a surcharge on respondent.

We affirm.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Christopher M. Murray